BRIEF IN SUPPORT OF PETITION.

I. Opinion Below.

The opinion of the Supreme Court of the State of Michigan, filed November 24, 1942, in the court below, has not yet been officially reported but is found in the record at page 2073.

The Trial Court did not write an opinion.

II. Basis of Jurisdiction.

This has already been discussed under the same heading in the Petition.

III. Further Statement of the Case.

Petitioner seeks a review of the judgment of the Supreme Court of the State of Michigan, filed November 24, 1942, (R. 2138a, 2068), affirming his conviction and sentence entered in the Circuit Court for the County of Wayne, State of Michigan, on the 14th day of May, 1941 (R. 187-88), after a trial before the Honorable Earl C. Pugsley and a jury.

The Petitioner was found guilty under the second count of an information (R. 28-43) charging a conspiracy to obstruct justice. Before the case went to the jury, the prosecutor elected to dismiss Count I (R. 1854). Count II charged Petitioner, then prosecuting attorney of Wayne County, and certain other public officials and persons with "the common-law offense of a conspiracy to obstruct justice" (R. 2075). The agreement allegedly consisted of a scheme to protect illegal enterprises for graft (R. 34-41).

Petitioner was sentenced to from four and one-half to

five years imprisonment, and to pay a fine of $2,000.00 (R. 1987-8).

The indictment, also known as a warrant under the State practice, was returned by a so-called one-man grand jury (Honorable Homer Ferguson). An inquisition was conducted wherein witnesses were interviewed in a star-chamber room in a local office building, (R. 478-9); subpoenas were served without regard to law (R. 341-7) and on many occasions witnesses were apprehended without subpoena (R. 1745); witnesses were held incommunicado for days (R. 1123, 4-30); third-degree methods were used (R. 478-9); other atrocities occurred (R. 1219-20). After thus securing "evidence," the indictment was returned. The same one-man grand jury constituted himself as the preliminary hearing magistrate to resolve the issue of probable cause; a written objection was made but ordered expunged by the grand jury; motion to quash the information was made on this ground (R. 69) and denied.

During the course of the trial, petitioner sought to lay a foundation for the impeachment of co-defendants and other witnesses by asking them whether they testified differently when appearing before the grand jury. In each instance the Trial Court denied Petitioner the right to cross-examine as to discrepancies between testimony during the trial and that given before the one-man grand jury (R. 242, 361-364; 479; 338, 349, 482, 855, 973, 1330). Upon the ground that "You can't go into the grand jury room here" (R. 242) the Trial Court repeatedly adopted the prosecutor's theory that

> "He has no right to ask any questions about what happened in the grand jury unless I bring it out, and that is the law" (R. 361-364).

Petitioner took the stand in his own defense. On cross-examination the prosecutor asked Petitioner if he had

claimed the privilege against self-incrimination when subpoenaed before the one-man grand jury (R. 1697-1700; 1704-1730), conceding that the purpose of the interrogation was not to impeach but rather to create an inference of guilt (R. 1699, 1700). The prosecutor simultaneously developed that *other* indictments were pending against petitioner (R. 1702). A mistrial was prayed (R. 1702) and denied (R. 1703). Petitioner objected (R. 1601, 1697-1700; 1738-40) claiming a denial of due process.

At the outset of the trial Petitioner made a written challenge to the array of jurors, attacking the validity of the panel because of the failure of the Jury Commission to follow the statute pertaining to the drawing of petit jurors and arbitrarily excluding many citizens from the panel, (R. 75, 78-81). After trial, additional challenges were made (R. 2019, 2029-35; 2035-41). Grounds averred were that

a) the Jury Commission did not make up the jury list but delegated this power to its secretary (R. 2029);

b) instead of each Commissioner making up a list of qualified electors in his district as required by the statute, the Commission permitted its secretary to make up a list from a list of *registered voters* under a so-called key number system (R. 2030);

c) the Jury Commission used an ancient poll list rather than a current one, e.g. used a 1933 list of *registered voters* showing but 400 names in Brownstown Township whereas in 1940 there were 2900 registered voters, and in Hamtramck, out of about 25,000 registered voters in 1940, only one juror was selected, and one juror had been examined for jury duty on November 23, 1934 (R. 2040);

d) the records of the Jury Commission and of the Wayne County Clerk showed that on one jury list "A" for the month of January, 1941, there were 115 jurors' names yet

38 of these names were not included in the list certified by the Commission (R. 2039-41);

e) that from communities where large Republican majorities predominated in elections the secretary of the Commission selected many jurors, while from communities where the election showed heavy Democratic majorities he selected few if any jurors (R. 2042-7);

f) although Belleville contained 400 registered voters, the secretary selected 16 jurors; from Plymouth with 2700 registered voters he selected 14 jurors, from Wyandotte with 12,000 registered voters he selected 11, from Dearborn with 27,000 registered voters he selected 6, and from Ecorse with 7,000 registered voters 5 jurors were selected (R. 2044-47);

g) the secretary used a so-called key number system without any authorization by the Commission, notwithstanding that he had testified falsely under oath in another proceeding against this Petitioner that he had been authorized by the Commission to use such system (R. 2048).

The Trial Court refused to consider the challenge before trial and summarily overruled Petitioner's contention (R. 78) and did likewise when the challenge was renewed on motions for a new trial (R. 2041, 2047, 2050).

At the time of the filing of the information the prosecutor failed to indorse the names of certain res gestae witnesses on the information, although so required by mandatory statute (R. 28, 41-3). In the course of the trial objection was made to the failure on the ground that the prosecution knew that these witnesses were essential to the presenting to the jury of a full picture of the alleged overt acts of the conspiracy (R. 93-6). The trial court summarily ordered the endorsement of the names of some twenty res gestae witnesses (R. 415), notwithstanding that petitioner was

then in no position to determine the impartiality of the petit jury in relation to these twenty witnesses. Under the State practice the prospective panel is interrogated on the matter of contact or relationship between the jurors and witnesses on the voir dire. This could not be done as to these twenty witnesses.

After the retirement of the jury, and deliberation begun, the Court, without the knowledge or consent of defense counsel, sent in various Exhibits to the jury (R. 1906). Three volumes of testimony were also given to the jury, without the knowledge or consent of Court or counsel (R. 1900). Petitioner moved for a mistrial (R. 1906); denied (R. 1934).

IV. Specification of Errors.

A specification of the errors intended to be urged has been given in the accompanying Petition under the Heading "Questions Presented" and in the interest of brevity will not be repeated, but is referred to and incorporated herein as though set out at length.

V. ARGUMENT.

(1) The substantial restriction of the right of cross-examination (Question 1).

The opinion of the Supreme Court of the State of Michigan states that with respect to the denial of Petitioner's efforts to lay a foundation for impeachment of witnesses by bringing out what their testimony before the grand jury had been, that the Petitioner

> "could have examined or cross examined witnesses without referring to their grand jury testimony. If he was not satisfied with their testimony, he could have called either Judge Ferguson or the stenographer who took the grand jury testimony to testify as to whether

> the witnesses' testimony before the grand jury was 'different from' the evidence given by such witnesses at the trial" (R. 2096).

That this is no answer is made only too clear by the ruling of the Trial Court holding that Petitioner "could not go into the grand jury here" (R. 242) and that the Petitioner had "no right to ask any question about what happened in the grand jury" unless first developed by the government (R. 361-364, 479). In each instance the Trial Court sustained the prosecutor's objections "to any question with reference to the grand jury testimony" (R. 362). Thus there was real merit to Petitioner's contention that it would have been futile to call Judge Ferguson (the one-man grand jury), notwithstanding what the Court Below says (R. 2097). Assuming that Judge Ferguson could have been called, the right to cross examine should not have been so delimited.

We are at a loss to understand a theory that permits the prosecution to lay a foundation for impeachment but denies the same opportunity to the defendant. We know of no policy, State or Federal, sanctioning one rule of evidence in favor of the State and following the opposite of the rule against the defendant. No traditional rule of secrecy of grand jury proceedings is in any way involved. The viciousness of so restricting the Petitioner goes to the right of cross examination which this Court has held to be a fundamental right and of the essence of due process of law.

In *Alford* v. *United States*, 282 U. S. 687, it is stated that

> "The cross examination of a witness is a matter of right." The Ottawa, 3 Wall. 268, 271.
>
> "Its permissible purposes, among others, are • • • that facts may be brought out tending to discredit witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee v. United States*, 167 U. S. 274; *King v. United States*, 112 Fed. (2d)

988; *Farkas v. United States,* 2 Fed. (2d) 644; see *Furlong v. United States,* 10 Fed. (2d) 492, 492." 282 U. S. 692.

The vital importance of permitting such cross-examination lies in the realization that counsel

> "cannot know in advance what pertinent facts may be elicited on cross examination. For that reason it is necessarily exploratory; * * * it is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross examination might develop * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Nailor v. Williams,* 8 Wall. 107, 109."

In the present case, some of the witnesses to whom questions were propounded with respect to their grand jury testimony were co-defendants who had turned state's evidence. The essential need for permitting the defense to test their credibility, in the light of what they might have previously testified to before the grand jury prior to immunity granted, is epitomized in the language of Chief Justice Stone in *Alford* v. *United States,* 282 U. S. 687, wherein he states that the defendant should be permitted to show by such facts as proper cross-examination might develop that the testimony of the witness was biased because "given under promise or expectation of immunity or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."

Clearly the Trial Court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a

reasonable cross-examination (282 U. S. 694.) Cf. *Gaines* v. *United States*, 277 U. S. 81, 85; *Dowell* v. *United States*, 221 U. S. 325.

In the setting of the trial below a substantial right was denied. Wigmore has said "if we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improve methods of trial-procedure." *V Wigmore on Evidence*, (3 ed.) Sec. 1367, page 29.

The ruling of the Court Below is contrary to every known authority: *Regina* v. *Gibson*, 1 Car. & M. (41 Eng. Com. L. 364); *State* v. *Silverman*, 100 N. J. L. 249, 252, 253; *Commonwealth* v. *Mead*, 12 Gray (Mass.) 167; *Burdick* v. *Hunt*, 43 Ind. 381-9.

This Court has stated that while due process is essentially a matter of state law, that nonetheless there must be an adequate opportunity to be heard and to defend. See *Snyder* v. *Mass.*, 291 U. S. 97. A substantial Federal Question is presented when the right of cross-examination has been so restricted as to affect the adequacy of the opportunity to be heard and to defend. What could be more important to the defense of Petitioner in a conspiracy case than the opportunity to lay a foundation for the impeachment of his alleged co-conspirators, some of whom had turned state's evidence, and left him in the position of pitting his word against theirs?

(2) The disclosure before the petit jury of petitioner's claim of immunity before the grand jury (Question 2).

The Constitution of the State of Michigan provides

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." (Mich. Constitution, 1908, Art. 2, par. 16)

The Supreme Court of Michigan states that

> "A witness *subpoenaed* to testify in a criminal trial can stand upon his constitutional right and refuse to answer any questions which might tend to incriminate him. However, a defendant who voluntarily takes the stand in his own defense thereby waives such right and can be subjected to cross-examination concerning the facts of the case and as affecting his credibility." (R. 2134.) (Italics ours.)

The Court Below recognized the relation of the compulsion of the *subpoena* to the constitutional guarantee. The Petitioner was subpoenaed before the one-man grand jury after three warrants had been drawn by the same one-man grand jury naming him as a defendant. The following colloquy took place between the one-man grand jury and the Petitioner:

> "Q. Did you ever discuss policy with Colburn, policy and mutuel games?
> A. Not that I know of, but I still claim that I have a constitutional right not to answer.
> Q. Do you stand on your constitutional rights?
> A. Yes, I do.
> Q. In connection with that question?
> A. Yes.
> Q. Why?
> A. I am charged as a defendant in that case.
> Q. (By the Court): That is not a reason, if that is your only reason you will have to answer.
> A. I will say on the ground it might tend to incriminate me" (R. 171).

The Petitioner took the stand in his own defense in the trial below (R. 1636). On cross-examination, the prosecutor inquired of Petitioner as to whether he had been called before the grand jury. Petitioner replied that he had after the information had been returned (R. 1697), whereupon Petitioner asked that the jury be excused. Objection was

made to any demonstration by the prosecutor before the jury that Petitioner had stood on his "constitutional rights" before the grand jury (R. 1697), "constitutional rights, not only of the State, but of the United States Constitution" (R. 1698) to demonstrate "to this jury * * * that there must be an inference of guilt because he stood upon his constitutional rights at the time he was defendant in this case" (R. 1698). The prosecutor asserted that the petitioner should have chosen to be held in contempt and that "a lawyer and a prosecutor of long standing" had no right to stand on his rights and "then claim he can't be confronted with that in this court room" (R. 1699). The trial court stated that "if he had committed no wrong, there would be nothing in connection therewith which would incriminate him" (R. 1811-12).

On innumerable occasions the prosecutor, over objection, disclosed to the petit jury that Petitioner had claimed his immunity (R. 1697, 1711, 1715-1717, 1728-1730).

We submit that it is hardly compatible with the fundamental notion of a fair and impartial trial to make such a disclosure before the trial jury when

> (a) three indictments had already been returned against the Petitioner by the one-man grand jury without his having been called before the grand jury; (b) the indictment on which the present prosecution was had had already been served on the Petitioner when he was called before the grand jury; (c) *subpoenaed* before the grand jury and interrogated with respect to the defense he might have to the charges in the indictment; (d) the one-man grand jury, after Petitioner had indicated that he did not wish to disclose his defense in view of the fact that he was going to trial, gave Petitioner the choice of answering, being held in contempt, or claiming the state privilege.

The prosecutor and one-man grand jury must have known that inasmuch as this Petitioner had been named in three indictments he would not desire to disclose his defense to the same one-man grand jury which indicted him. The Petitioner informed the grand jury when summoned before it that he had already been named as a defendant in the present prosecution and two other cases, and for that reason did not desire to testify (R. 1710, 1730). The conclusion is inescapable that the only purpose of the prosecutor and one-man grand jury when calling this Petitioner before the grand jury under these circumstances was to prejudice him in the trial of this case. Obviously, the prosecutor did not expect the Petitioner to disclose his defense. Obviously, the prosecutor knew that this Petitioner could not convince the one-man grand jury that the warrant should be recalled. Obviously, the prosecutor knew that the Petitioner did not care to and would not testify before the same one-man grand jury under the circumstances.

This is not *Twining* v. *New Jersey,* 211 U. S. 77. The law of the State of New Jersey denied the privilege against self-incrimination. This Court held that this was not a denial of a Federal right. Our claim is not addressed to that proposition. The State of Michigan *guarantees* the privilege and by constitutional limitation restricts governmental power. Our claim is that having affirmatively granted the privilege the respondent has denied the Petitioner a fair and impartial trial in that Petitioner was led to rely on the privilege only to have it used against him before the petit jury. This was not a case where the government sought to impeach or contradict by the use of grand jury testimony, but was rather an outright parading carte blanche before the petit jury that Petitioner had stood on his state right, and it becomes all the more serious under the setting. Wigmore has championed the abolition of the privilege but not even he thinks the cross-examination

ought to go to "facts merely affecting credibility", *Evidence*, Sec. 2276, p. 445 (3rd Ed.) and in his voluminous treatise not a case in our jurisprudence is cited wherein a plain, bold disclosure was made to create the inference of guilt.

This is not *Raffel* v. *United States*, 271 U. S. 494. The question there involved the right in a Federal Court to show that the defendant had not taken the stand at a former trial of the same case. A waiver had occurred. Cf. *Arndstein* v. *McCarthy*, 254 U. S. 71). The line of cross-examination was found to be *proper*. The present case presents the anomalous situation of the one-man grand jury, who had thrice indicted the defendant, *bringing a defendant under process* before it, *forcing*, in law and in fact, the defendant to stand on his constitutional guarantee, knowing full well that the defendant must take the stand in his own defense at the trial. Cf. *United States* v. *Johnson*, 129 F. (2d) 954, 965, 966. To justify the interrogation on the theory that the Petitioner voluntarily took the stand and thereby waived his state or federal right under the facts of this case is to shun reality. It is entirely conceivable that the prosecutor might in every single case on the docket, after indictment returned, call a defendant before the grand jury, knowing full well that he will not disclose his defense, and then confront the defendant with his claim of immunity at the trial. The prosecutor, Trial Court and Court Below seem to feel that unless a named defendant is guilty he will have no hesitancy in making a full disclosure of his defense. The effect of such a preposterous system is to give the government not only a dress rehearsal but the opportunity to trap the defendant beyond the possibility of his being able to redeem himself. *8 Wigmore*, Sec. 2251 at 309. The inference created by such a practice is so strong as to go to the marrow of the concept of a fair trial. Cf. *United States* v. *Monia*, No. 248, Oct. Term,

1942. The conduct of the prosecutor and one-man grand jury made this no less "a trap for the witness"; *Wood* v. *U. S.*, No. 7863, District of Columbia Court ofAppeals, LXX Washington Law Reporter 690, 693; *Kercheval* v. *U. S.*, 274 U. S. 220.

We have been unable to find any case precisely in point. The likelihood of such a practice arising or existing in the Federal system is most remote; however, its use and sanction in the State of Michigan may lead to its adoption abroad, and we respectfully submit that this Court should determine its consistency or inconsistency with the Federal Constitution at this time.

(3) The failure to indorse the names of certain res gestae witnesses on the information (Question 3).

The settled law of the State of Michigan required that the prosecutor at the time of the filing of the information indorse thereon the names of all *res gestae* witnesses. The provision of the State Criminal Code thereto relating had been construed to be mandatory in many cases by the State Supreme Court. In the Trial Court the prosecutor was charged with deliberately failing to indorse on the information the names of certain witnesses, notwithstanding that the prosecutor was well aware that these witnesses would be used. An examination of the record would indicate that several of these witnesses were most important in the government's case in chief. The Petitioner charged below that the failure to indorse was deliberate and intentional (R. 233), particularly in the light of the fact that the prosecutor explained his failure as being due to "forgetfulness" although he did remember to indorse the names of various minor police officials.

The Court Below approved the action of the Trial Court in summarily ordering the indorsement of the names of *res gestae* witnesses during the trial (R. 2119-2127). Re-

liance is had on a provision of state law which permits the prosecution to indorse the names of *other* witnesses during trial (R. 2127), and on the catch-all state statute which provides that no judgment shall be set aside unless it affirmatively believes that the error complained of resulted in a miscarriage of justice (R. 2127).

This Court has said that in addition to an adequate opportunity to be heard and to defend, a defendant is as a matter of Federal due process entitled to *notice*. We respectfully submit that the fundamental right as envisioned in the idea of *notice* connotes that the defendant shall receive more than information to the effect that he has been charged with an offense and that a hearing will be had thereon at a given date. Under the established procedure of the State of Michigan the Petitioner quite properly relied on the statute and the decisions of the Court making it mandatory for the government to indorse the names of *res gestae* witnesses on the information.

It is the established practice in Michigan for counsel on the *voir dire* to interrogate the panel as to whether any member thereof had had contact with any witness whose name is indorsed on the information. It is error under the State law to call a witness whose name is not endorsed. Yet, the trial court in the instant case summarily ordered the endorsement, during the trial, of over twenty names on the information. The jury had been chosen and was sworn. No right to interrogate the jury with respect to these witnesses was possible. In our Federal Courts it is quite true that the defendant gets no such right or privilege (capital cases excepted), but the fact is that in the instant case the Petitioner was led to rely on the statute and the established procedure, and consequently was surprised when at the trial *res gestae* witnesses, whose names did not appear on the information, were called and used by the government. This too goes to the question of a fair and impartial trial

and taken together with numerous other acts on the part of the government, some of which are herein complained of, denied the Petitioner due process of law. Michigan itself has said that "The failure to indorse and produce these witnesses is not a mere irregularity. It is a positive invasion of a substantial right of defendant under the law." *People* v. *Hill*, 258 Mich. 79, 82, 83.

(4) The exclusion from the petit jury panel of qualified electors (Question 4).

Petitioner challenged the array of prospective jurors after fourteen persons had been called to the jury box for examination on *voir dire*, claiming that the list of jurors furnished by the Jury Commissioners was not taken "from all the qualified electors of Wayne County" (R. 75, 78-81). Specifically Petitioner claimed that electors were excluded who were not registered voters, although they had all of the other qualifications of jurors (R. 2128, *et seq.*). The Court Below summarily dismissed the contention stating in part that the Petitioner "makes no showing that the jurors selected from the list of registered voters were prejudiced against him or that the jury finally chosen failed to consider the question of his guilt or innocence in a fair and impartial manner" (R. 2129). In connection with his motion for a new trial Petitioner set up additional evidence challenging the jury panel. The Court Below dismissed this supplementary evidence on the grounds that Petitioner was a former prosecutor and therefore familiar with the procedure of the Jury Commission and, further, that he had not exercised reasonable diligence in discovering the irregularities (R. 2130).

The validity of the panel was challenged in that

(1) the Commission failed to follow the provisions of the statute pertaining to selecting the panel from

all qualified electors (R. 75, 78-81); (2) the Commission as such did not make up the jury list but delegated the power to its Secretary; (3) instead of each Commissioner making up a list of qualified persons as required by the statute, the Commission permitted its Secretary to make up a list from a list of registered voters under a so-called key number system (R. 2029-2041).

Petitioner alleged further that from communities where large Republican majorities predominated in elections, the Secretary of the Jury Commission selected many jurors, while from communities where the elections showed high Democratic majorities he selected few, if any, jurors, and that from Brownstown Township, which contained 2900 registered voters in December 1940, he selected the jurors from a 1933 list of registered voters containing only 400 names; that although on December 1, 1940 the City of Hamtramck had 24,557 registered voters, the Secretary selected only one lone, solitary juror; that although Belleville contained 400 registered voters, the Secretary selected 16 jurors; from Plymouth with 2700 registered voters he selected 14 jurors; from Wyandotte with 1200 registered voters he selected 11; from Dearborn with 2700 registered voters he selected six, and from Ecorse with 7000 registered voters 5 jurors were selected (R. 2029-2050; particularly 2042-2045).

While a state may take away trial by jury, where as a matter of state constitutional right trial by jury is granted a defendant, we respectfully submit that the trial by jury must comport with the fundamental notions of a fair and impartial trial. In such a case something less than a trial by jury is no trial at all. A trial by jury has a singular meaning in Anglo-American law. This Court has recently recognized the vital significance of illegally constituting the

jury. *Glasser v. United States*, 315 U. S., 60, 85-87. In its Report to the Chief Justice of the United States and members of the Judicial Conference of Senior Circuit Judges of the United States, the Committee on *Selection of Jurors* recommended, *inter alia*, that petit jurors be so drawn as to be truly representative of the community, the "sources from which they are selected should include *all* economic and social groups of the community"; that "political affiliation should be ignored." (Pages 14-30, February, 1942).

The Court Below placed great emphasis in its opinion on the failure to discover all of the irregularities prior to trial (R. 2130). The fact is that in the present case the challenge was made timely as to certain allegations (R. 75, 78-79). In any event, the government did not deny the allegations of the motions at the commencement of the trial or subsequent thereto, although the Court overruled all of the said motions (R. 78, 2041, 2047, 2050). The requirements to establish the allegations as set forth in *Glasser* v. *United States*, 315 U. S. 87, are herein present, for there were actual tenders of proof (R. 76, 2029-2035, 2035-2041), and affidavits were filed supporting the motions (R. 2033-2035, 2038-2041, 2049).

In many cases this Court has held that a person has been deprived of the equal protection of the laws in violation of the Fourteenth Amendment, because by the action of state officers in the selection of jurors, such person has been indicted by or tried before a jury not of his peers. Such was the holding where, by the action of state officers there had been a discrimination in the drawing of jurors because of political affiliations. *Kentucky* v. *Powers*, 201 U. S. 1 (reversed on other grounds); also *Kentucky* v. *Powers*, 139 Fed. 452.

Without burdening the Court on this phase of the argument, it is sufficient to say that the great weight of author-

ity in this Court, as is evidenced by the following citations, supports our position:

Neal v. *Delaware*, 103 U. S. 370
Smith v. *Mississippi*, 162 U. S. 592
Rogers v. *Alabama*, 192 U. S. 226
Strander v. *West Virginia*, 100 U. S. 303
Pierre v. *Louisiana*, 306 U. S. 354
52 *A. L. R.* 919-930
92 *A. L. R.* 1109-1124
Cf. *Glasser* v. *U. S.*, 315 U. S. 60, 85-87.

The common law controls in Michigan unless altered or repealed, 1 Mich. Comp. Laws 246; Const. Art. VII, Sched. Sec. 1. Trial by jury in a criminal case is guaranteed in the State Constitution, Art. II, Sec. 13, 1 Mich. Comp. Laws 198. The qualifications of an elector are set forth in Art. III, Sec. 1 of the Constitution, 1 Mich. Comp. Laws 201. Jurors shall have the qualifications of electors, 3 Comp. Laws 4921, Sec. 13841. The method of selecting jurors is governed by statute, 3 Comp. Laws, 4920-26, Secs. 13837-13862. A reading of these statutes clearly demonstrates that the Jury Commission is bound by the mandatory provisions of these statutes. It is elementary that statutes in derogation of the common law are to be strictly construed, yet the Jury Commission in the instant case completely ignored the statutes governing the selection of jurors. There was no trial by a jury of one's peers from the vicinage and discriminations were rampant.

(5) There was no trial at all in any fair sense of the term (Question 5).

Without the consent or knowledge of the Court and Petitioner three volumes of testimony were sent into the petit jury room. The volumes were obtained by an officer of the one-man grand jury who was in attendance at the trial (R. 1900). This officer transmitted the volumes to an offi-

cer of the petit jury, who in turn gave them to the jury. Sometime prior thereto the Court, at the jury's request, but without the knowledge or consent of the petitioner, sent in certain exhibits to the jury. Petitioner moved for a mistrial (R. 1906), which was overruled (R. 1934).

The Court Below considered the question (R. 2111-2119) and ruled that no prejudice resulted (R. 2117). Notwithstanding that these volumes contained, among other prejudicial testimony, the colloquy of the Trial Court and defense counsel, in the absence of the jury, regarding the social activities and jitterbugging of the jury while it was confined in a hotel (R. 218), which incident was passed over by the Court Below (R. 2111-2119).

We submit that the excusing of these serious errors cannot be justified on a theory that no prejudice was shown. Such reasoning not only begs the question, but ignores the constitutional precept involved. This Court has held that the deprivation of trial by jury does not contravene Federal due process. Here, however, the state guaranteed trial by jury and therefore the entire proceeding in the Trial Court had to comport with the traditional and historical requisites of a jury trial. To give Petitioner something less than a jury trial when the established procedure under which he was tried so required was to give him no trial at all. Michigan did not authorize the Court to send in the exhibits. Michigan did not sanction the sending into the jury by some Court attaches of the volumes of testimony. Under Anglo-American jurisprduence, unless there is a state law contrariwise, the jury as triers of fact is required to resolve exclusively the facts on the testimony adduced in open court. Even in the Fourteenth Century the jury could only carry out with them writings under seal. Thayer, *A Preliminary Treatise on Evidence at Common Law*, p. 107. To permit a jury to reorient and rehash testimony from the *unauthenticated* transcript is to cast asunder judicial

supervision, the oath, and the opportunity to be heard and to defend, all of which enter into the standards of a fair and impartial trial as guaranteed by the Federal Constitution. The position herein adopted has been consistently maintained since *Bushel's* case, Vaughan, 135; 6 How. St. Tr. 999. Michigan itself only recently recognized that such a flagrant departure from the concept of trial by jury casts "suspicion upon the otherwise orderly administration of justice". *People* v. *Chambers,* 279 Mich. 73, 80, 81. We respectfully submit that the Trial Court lost jurisdiction of the case below when the jury received these volumes of testimony and exhibits. See *Johnson* v. *Zerbst,* 304 U. S., 458, 468. The whole proceeding became a mere pretense of a trial. See *Brown* v. *Miss.*, 297, U. S. 278, 285, 286. The disorderly departures denied Petitioner a fair trial in the sense that they offend fundamental principles of justice within the meaning of *Powell* v. *Ala.,* 287 U. S. 45; see also *Mooney* v. *Holohan,* 294 U. S. 103, 112, 113.

> "It is clear that the reception of evidence after the jury has retired to consider a verdict reaches the extreme of irregularity." Wigmore on Evidence, Vol. VI, 3d ed., Sec. 1880.

(6) Preliminary examination conducted by judge who indicted as one-man grand jury (Question 6).

We have seen that the one-man grand jury conducted an unprecedented inquisition, and returned four indictments against this Petitioner. Prosecution was instituted on the second of these indictments, and the same one-man grand jury then sat as the magistrate at the preliminary hearing. Formal objection was made but the same one-man grand jury ordered it expunged from the record. Thereupon, the Petitioner filed a motion to quash the information several days before trial and the Trial Justice overruled it (R. 68, 69, 75). He asserted that it was a denial of State

and Federal due process for a one-man grand jury to sit as a judge at the preliminary hearing to determine the issue of probable cause when he had sworn to the complaint upon which the indictment was bottomed. There is no statute authorizing this procedure. The Court Below, however, by a process of inter-relating various statutes (R. 2099), concluded that a one-man grand jury had the power to investigate and sit in judgment on the facts he found. The underlying basis, however, of the opinion below on this point was that Petitioner had no Federal right to a preliminary examination (R. 2099). In the light of the established procedure and guaranteed state rights possessed by the Petitioner, this conclusion is hardly worthy of further treatment.

It is respectfully submitted that due process of law does not begin and end with the trial *qua* trial. The protection of the citizen against the acts of government begins prior to and extends beyond the inpaneling and discharging of a petit jury. It is only too obvious from a consideration of the constitutional limitations on the Federal Government contained in the Bill of Rights that many of our fundamental guarantees pertain to matters other than the conduct of the trial as such. The question with which we deal here relates to the denial of the Federal Right in that Michigan, after establishing a procedure to be followed in *holding* a defendant for trial, completely and summarily abandoned this procedure as to the Petitioner. Petitioner knows of no case wherein this Court has held that a state may bring a defendant to the bar of justice without following the forms of law where by specific statute a procedure is established. To adopt the unconstitutional procedure in the light of state law herein complained of was to deny Petitioner due process and equal protection of the law. No similar proceeding in the history of Michigan can be found. See 8 *Wigmore*, Sec. 2251; Cf. Sec. 2252, at 325 bb.

The combining of inquisitorial and judicial functions makes for a denial of due process and equal protection, particularly in the light of the conduct of the inquisitor in securing the evidence upon which probable cause was resolved. Witnesses were questioned at places other than the court room, in homes (R. 341); before police officers (R. 342); in the night; in zero weather were required to sleep with clothes on in bare rooms in a bank building; without food (R. 478-9) were held for five and six days; sleep was refused and other atrocities occurred (R. 1123-1130; 1219-1220). The collection of this "evidence" was supervised and the facts and evidence developed by the one-man grand jury. It was not the normal case where a warrant is issued upon the basis of a complaint based on testimony of witnesses. In this case we have a finding of probable cause upon testimony *produced* by the so-called grand jury. Petitioner was denied the right on preliminary examination to go before a judge who had no preconceived opinion or belief as to guilt or innocence or the existence or want of existence of probable cause. Moreover, the one-man grand jury had gone publicly on record as to his belief in the guilt of the Petitioner by instituting a proceeding before the Governor of the State of Michigan to remove Petitioner as prosecutor of Wayne County (R. 69, 70). He was the complaining witness in the ouster proceeding and was therefore interested in the outcome of the preliminary examination. The dangers inherent in permitting a judge to act as inquisitor, investigator and court are deplored in the case of *In re: Richardson,* 274 New York 401, 160 N. E. 655-8, by Justice Cardozo who stated that "Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We shall be sorry to weaken that tradition by any judgment in this court."

While as the Court Below states, the record contains no affidavit (R. 299), it having been expunged by the one-man grand jury sitting as an examining magistrate, Petitioner did move to quash the information, claiming that the pretense of a preliminary examination was in contravention of the State and Federal Constitutions (R. 69-73). The Petitioner further asserted that even though the state law might permit the grand jury to sit as magistrate, this would be an impingement on Federal due process. It is felt that no citation of authority is required to rely upon the well-settled proposition that the irregular enforcement of an otherwise constitutional statute, or the acts of state officials, may be such as to deny Federal due process. The situation is quite different from the case where by state constitutional amendment criminal prosecutions are authorized to be filed without preliminary examination. Cf. *Woon* v. *Oregon,* 229 U. S. 586.

Conclusion.

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the judgment below.

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